

Part III – Administrative, Procedural, and Miscellaneous

Notice 2010-80

Modification to the Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a)

I. PURPOSE

This notice modifies certain provisions of Notice 2008-113, Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a) in Operation, 2008-2 C.B. 1305, and Notice 2010-6, Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a), 2010-3 I.R.B. 275. Specifically, this notice:

- Clarifies that the types of plans eligible for relief under Notice 2010-6 include a nonqualified plan linked to a qualified plan or another nonqualified plan, provided that the linkage does not affect the time and form of payments under the plans;
- Expands the types of plans eligible for relief under Notice 2010-6 to include certain stock rights that were intended to comply with the requirements of § 409A(a) of the Internal Revenue Code (rather than be exempt from the requirements of § 409A(a));
- Provides an additional method of correction under Notice 2010-6 for certain failures involving payments at separation from service subject to the requirement to submit a release of claims or similar document; and provides transition relief permitting the correction of such failures that were in effect on or before December 31, 2010 (including relief from the service provider information reporting requirements);

- Provides relief from the service provider information reporting requirements under Notice 2010-6 for corrections made under the transition relief ending December 31, 2010; and
- Provides relief from the requirement that service recipients provide certain information to service providers under Notice 2008-113 for corrections made in the same taxable year as the failure occurs.

II. BACKGROUND

On December 3, 2008, the Treasury Department and the IRS issued Notice 2008-113, providing relief and guidance on corrections of certain failures of a nonqualified deferred compensation plan to comply with the operational requirements applicable under § 409A(a). On January 5, 2010, the Treasury Department and the IRS released Notice 2010-6, providing relief and guidance on corrections of certain failures of a nonqualified deferred compensation plan to comply with the plan document requirements applicable under § 409A(a). Section XI of Notice 2010-6 provided transition relief under which taxpayers generally could avoid income inclusion under § 409A(a) solely due to the failure of the plan language to comply with the requirements of § 409A(a), if the plan document failure and any related operational failure were corrected before January 1, 2011 in accordance with the guidance (although an amount may be required to be included in income under § 409A(a) due to the correction of the related operational failure).

The Treasury Department and the IRS received numerous comments on the guidance regarding the correction of failures to comply with § 409A(a). The Treasury Department and the IRS continue to analyze the comments and anticipate issuing

further corrections guidance in the future. However, because certain transition relief provided in Section XI of Notice 2010-6 requires correction of plan document and related operational failures before January 1, 2011, the Treasury Department and the IRS are issuing this guidance to provide immediate relief to taxpayers with respect to certain issues under Notice 2008-113 and Notice 2010-6.

III. GUIDANCE

A. This § III.A. clarifies § III.G. of Notice 2010-6 by providing that the types of plans eligible for relief under Notice 2010-6 include (1) certain linked plans with plan document failures if the linkage does not affect the time and form of payment of amounts under the plans, and (2) certain stock rights (stock options and stock appreciation rights) that were intended at the time of grant (or upon a modification pursuant to applicable transition relief) to be subject to, and compliant with, § 409A but that have a plan document failure. Accordingly, § III.G of Notice 2010-6 is modified to read as follows:

“G. Certain Linked Plans and Stock Rights not Eligible for Relief

Except as specifically provided in § XI.B of this notice, the relief provided under this notice does not apply to a plan to the extent that the document failure is due to the time and form of payment being affected by the amount deferred under, or the payment provisions of, one or more other nonqualified deferred compensation plans or one or more qualified plans (as defined in §1.409A-1(a)(2)). However, a plan does not fail to qualify for the relief provided under this notice merely because the amount paid under one plan is affected by the amount paid under the other plan, provided the time and form of payment under the first plan is not affected by the amount deferred under, or the

payment provisions of, the other plan. In addition, the relief provided under this notice does not apply to a stock right (as defined in §1.409A-1(l)) unless pursuant to the terms of the stock right at the time of grant or as modified in accordance with applicable transition relief, the recipient of the stock right has the right to exercise such stock right only upon one or more of the following: (1) a fixed date or a period beginning and ending within one taxable year (generally the calendar year for individual taxpayers); or (2) a permissible payment event under § 409A and §1.409A-3(a) (including any period following a payment event permitted under §1.409A-3(b)). For this purpose, a permissible payment event under § 409A and 1.409A-3(a) includes a payment event eligible for correction under §§ IV and V of this notice. For example, the relief provided under this notice would apply to a stock right subject to § 409A granted to an employee with a calendar year taxable year, where the right had an exercise date of the earlier of a fixed date or the period beginning with the employee's separation from service and ending on December 31 of the calendar year in which the employee separated from service, provided that the definition of separation from service either complied with the requirements of §1.409A-1(h) or was eligible for correction under § V.A of this notice. For certain relief with respect to a stock right with an exercise price that is less than the fair market value of the underlying shares of stock at the date of grant, see Notice 2008-113, §§ IV.D and V.E.”

B. This § III.B modifies § VI.B.2 of Notice 2010-6 by providing an additional method of correction for certain failures involving payments dependent upon the service provider completing certain employment-related actions (such as the execution and submission of a noncompetition agreement, a nonsolicitation agreement, or a release of claims).

Under this additional method, the failure may be corrected by providing for payment during a specified period not longer than 90 days following a permissible payment event, provided that if the period begins in a service provider taxable year and ends in the subsequent service provider taxable year, the payment will be made in the subsequent taxable year. Accordingly, § VI.B.2 of Notice 2010-6 is modified to read as follows:

“2. Correction

A plan provision eligible for this section may be corrected in accordance with this section before the date an event occurs that would be a permissible payment event under § 409A to which the provision applies. The plan may be corrected by amending the plan to remove the ability of the service provider to delay or accelerate the timing of the payment as a result of the service provider's action. If the plan provides for payment (subject to the service provider's action) within a designated period following the permissible payment event under § 409A that is a permissible payment period under §1.409A-3(b), except that the service provider's action could affect the taxable year of payment, the amendment must provide either (a) for payment only on the last day of such designated period, or (b) for payment in the second taxable year if in any event the designated period begins in a first taxable year and ends in a second taxable year. If the plan does not provide for payment (subject to the service provider's action) within a designated period following the permissible payment event under § 409A that is a permissible payment period under §1.409A-3(b), the amendment must provide either (a) for payment only upon a fixed date either 60 or 90 days following the occurrence of the permissible payment event, or (b) for payment during a specified period not longer than

90 days following the occurrence of the permissible payment event under the condition that if the specified period begins in one taxable year and ends in a second taxable year, the payment will be made in the second taxable year. In addition, a plan may be amended to provide for payment in accordance with clause (b) of the immediately preceding sentence even though the plan was previously amended under § XI of this notice to correct a plan provision that allowed the service provider to delay or accelerate the timing of a payment as a result of the service provider's action. In each case the amendment may not otherwise change the time or form of payment.”

C. This § III.C modifies § VI.B of Notice 2010-6 by providing additional transition relief through December 31, 2012 for plans that contain certain failures involving payments dependent upon the service provider completing certain employment-related actions (such as the execution and submission of a noncompetition agreement, a nonsolicitation agreement, or a release of claims) as of December 31, 2010, provided that any payments made after March 31, 2011 that could be paid during a period that begins in one taxable year and ends in the subsequent taxable year are made during the subsequent taxable year and provided further that to the extent any amounts remain deferred under the plan, the plan is amended to be compliant by no later than December 31, 2012. Accordingly, the following § VI.B.3 is added to § VI.B of Notice 2010-6:

“3. Transition Relief

For any plan with a provision eligible for correction under this section on or before December 31, 2010, such provision will not be treated as failing to comply with § 409A(a) in form and a payment pursuant to such provision will not be treated as

having failed to comply with § 409A(a) in operation with respect to an amount deferred under the plan that is paid on or before March 31, 2011. For any plan provision eligible for correction under this section as of December 31, 2010, with respect to an amount deferred under the plan that is paid after March 31, 2011, such provision will not be treated as failing to comply with § 409A(a) in form for taxable years commencing on or after January 1, 2009, and payment pursuant to such provision will not be treated as failing to comply with § 409A(a) in operation, provided that (a) any amounts paid under the plan pursuant to such provision where the potential payment period begins in a service provider taxable year and ends in a subsequent service provider taxable year are paid in the subsequent taxable year, or if paid in the first taxable year are treated as an operational failure and corrected in accordance with Notice 2008-113; and (b) if any amounts that are subject to such a plan provision remain deferred after December 31, 2012 (other than any remaining installment, annuity or other payments of an amount that has already become payable pursuant to such a plan provision), the plan provision has been corrected in accordance with this section on or before December 31, 2012. For purposes of this § VI.B.3, the failure to pay an amount during the subsequent taxable year may be treated as an operational failure eligible for correction under Notice 2008-113 even though the plan provision under which the amount is paid fails to comply with § 409A. For purposes of this paragraph, a plan includes a substantially similar arrangement under which another service provider commences participation after December 31, 2010 in accordance with the plan terms as of December 31, 2010.”

D. To provide an example of the additional method of correction available for certain failures involving payments dependent upon the service provider completing certain

employment-related actions (such as the execution and submission of a noncompetition agreement, a nonsolicitation agreement, or a release of claims), the following examples are added to § VI.C of Notice 2010-6:

“Example 5 (impermissible payment provision making timing of payment after a permissible payment event dependent upon service provider action). The facts are the same as in Example 4, except that on April 1, 2011, Employer and Employee N amend Employee N's employment agreement to provide for payment within 90 days following Employee N's separation from service, provided that Employee N has executed and submitted a release of claims and the statutory period during which Employee N is entitled to revoke the release of claims has expired prior to payment during the 90-day period, and further provided that the payment would be made in the second taxable year if the 90-day period began in one taxable year and ended in the subsequent taxable year. Employee N has a separation from service with Employer on December 1, 2011. Employee N executes and submits a release of claims on December 15, 2011. Employer pays Employee N \$100x on January 1, 2012.

Conclusion: Because Employer and Employee N corrected the plan before Employee N's separation from service, Employee N is not required to include any amount in income under § 409A(a) solely due to the pre-correction plan provision.

Example 6 (transition relief - impermissible payment provision making timing of payment after a permissible payment event dependent upon service provider action). Employee SS is an employee of Employer whose employment agreement, entered into on January 1, 2009, entitles Employee SS to \$100x upon a separation from service (defined to comply with § 1.409A-1(h)), paid in ten annual installments (that were not

designated as separate payments for purposes of the application of § 409A) commencing within 90 days following Employee SS's separation from service, provided that Employee SS executes and submits a release of claims and the period during which Employee SS may revoke the release pursuant to applicable law has expired within the 90 day period. Employee SS has a separation from service with Employer on December 15, 2010. Employee SS executes and submits a release of claims on December 20, 2010, and Employer commences the annual installments of \$10X to Employee SS on December 31, 2010.

Conclusion: Because Employer paid Employee SS \$10X in accordance with the plan terms on or before March 31, 2011, Employee SS is not required to include any amount in income under § 409A(a) solely due to the plan provision or the payment of the \$10X.

Example 7 (transition relief - impermissible payment provision making timing of payment after a permissible payment event dependent upon service provider action).

The facts are the same as in Example 6, except that Employee SS's separation from service occurs on December 1, 2011, Employee SS executes and submits a release of claims on December 20, 2011, and Employer commences the annual installments of \$10X to Employee SS on December 31, 2011. No amounts remain deferred under the plan on December 31, 2011 except for the remaining installments on the amount payable at separation from service.

Conclusion: Provided that Employer and Employee SS treat the commencement of payment in 2011 as an operational failure under Notice 2008-113, and such failure is eligible to be corrected, and is actually corrected as an impermissible payment in

accordance with Notice 2008-113, Employee SS is not required to include any amount in income under § 409A(a) solely due to the plan provision. Note that had the payment commenced in accordance with the terms of the plan but during 2012, Employer and Employee SS would not have been required to treat the commencement of the payment as an operational failure under Notice 2008-113, and Employee SS would not have been required to include any amount in income under § 409A solely due to the plan provision.

Example 8 (transition relief - impermissible payment provision making timing of payment after a permissible payment event dependent upon service provider action).

Employee TT is an employee of Employer. Employer maintains a supplemental executive retirement plan that is a nonaccount balance plan for purposes of § 409A and that, as of December 31, 2010, provides for participation by every Level AA employee of Employer. On April 1, 2011, Employee TT receives a promotion to a Level AA position of employment, and accordingly becomes eligible for, and commences participation in, Employer's supplemental executive retirement plan. The plan provides for payment of a participant's benefit in a lump sum within 90 days following the participant's separation from service (defined to comply with § 1.409A-1(h)), provided that the participant executes and submits a release of claims and the period during which the participant may revoke the release pursuant to applicable law has expired within the 90 day period. On December 1, 2012, Employer corrects the plan provision in accordance with § VI.B.2 of this notice. Employee TT continues in employment continuously through December 31, 2012.

Conclusion: Because Employee TT became eligible to participate in accordance with the terms of the supplemental executive retirement plan that were effective as of December 31, 2010, Employee TT is eligible for the relief provided by § VI.B.3 of this notice. Because Employer corrected the plan provision under § VI.B.2 of this notice before December 31, 2012, the plan provision is not treated as having failed to comply with § 409A(a) for periods on or before December 31, 2012.”

E. This § III.E modifies § XII.A of Notice 2010-6 to provide relief from the requirement that a service recipient provide certain information to a service provider with respect to a plan document correction made in accordance with the transition relief under § VI.B.3 and § XI of Notice 2010-6. (However, the requirement that a service recipient include information with its own tax return relating to such a correction is not changed.) In addition, the modifications of § XII.A of Notice 2010-6 in this § III.E provide relief from the requirement that a service provider attach a statement to his or her return with respect to a plan correction made in accordance with the transition relief in § VI.B 3 and § XI of Notice 2010-6. Accordingly, § XII.A of Notice 2010-6 is modified to read as follows:

“A. Information and Reporting Required for Correction of a Document Failure

1. Service Recipient Requirements

A service recipient described in any of §§ V through XI of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which it corrects the failure, a statement entitled “§ 409A Document Correction under § [INSERT APPROPRIATE SECTION(S)] of Notice 2010-6” setting out the information required by § XII.B of this notice. This statement must also be attached to

the service recipient's timely-filed (including extensions) original federal income tax return for the service recipient's taxable year subsequent to the taxable year in which the failure was corrected, but only to the extent that a service provider is required to include an amount in income during such subsequent year to be eligible for the relief under this notice. In addition, a service recipient described in any of §§ V through X of this notice must provide to each such service provider who is affected by such failure a statement entitled "§ 409A Document Correction under § [INSERT APPROPRIATE SECTION(S)] of Notice 2010-6" setting out the information required by § XII.C of this notice not later than the date (with extensions) on which it is required to provide an information return (Form W-2 or 1099) to such service provider (or if no information return is required for such service provider, not later than the January 31 following the calendar year in which it corrects such failure) for the calendar year in which it corrects such failure. The service recipient described in any of §§ V through X of this notice must also provide the same information for the subsequent calendar year to the extent the service provider is required to include an amount in income during such subsequent year to be eligible for relief under this notice. In addition, any service recipient relying on the relief provided in any of §§ V through XI of this notice must make reasonable efforts to provide notice to the examining agent upon the commencement of an examination of such service recipient's federal tax return that the service recipient was relying upon the relief provided under this notice for years covered by the examination. A service recipient is not required to provide the information statements described in this § XII.A.1 to affected service providers with respect to a plan that is eligible for, and corrected under, § VI.B.3 or § XI of this notice, but the service recipient must attach the

information statement described in this § XII.A.1 to its federal income tax return with respect to such corrections.

2. Service Provider Requirements

A service provider who is relying on the relief provided in any of §§ V through X of this notice for a failure to comply with § 409A(a) must attach to the service provider's timely filed (including extensions) original federal income tax return for the year in which the failure was corrected the information required by § XII.D of this notice. A service provider relying on the relief provided in any of §§ V through X of this notice for a failure to comply with § 409A(a) must also attach the information required by § XII.D of this notice to that service provider's timely-filed (including extensions) original federal income tax return for the year subsequent to the year in which the failure was corrected, but only if the service provider is required to include an amount in income during that year to be eligible for the relief in this notice. In addition, any service provider relying on the relief provided in any of §§ V through X of this notice must make reasonable efforts to provide notice to the examining agent upon the commencement of an examination of such taxpayer's federal tax return that the taxpayer was relying upon the relief provided under this notice for years covered by the examination. A service provider is not subject to the requirements of this paragraph XII.A.2 with respect to a plan that is eligible for, and corrected under, § VI.B.3 or § XI of this notice.

3. Section References

For purposes of §§ XII.A.1 and XII.A.2, a section of this notice refers to each separate section of this notice, such that §§ VI.A and VI.B are separate sections, and for service recipients includes any use of the transition relief in § IV.B.3 or § XI.”

F. To provide conforming relief with respect to the information to be provided to service providers upon use of the transition relief in § IV.B.3 or § XI of Notice 2010-6, § XII.C of Notice 2010-6 is modified to read as follows:

“C. Information to be Provided to Service Provider for Failures Described in any of §§ V through X of this Notice not Eligible for Relief Under § VI.B. 3 or § XI of this Notice

The service recipient must provide the following information to each service provider affected by a failure to comply with § 409A who is entitled to relief under any of §§ V through X of this notice (but is not eligible for and corrected under the relief provided in § VI.B.3 or § XI of this notice) with respect to such failure:

(1) A statement that the service provider is entitled to the relief provided in §§ V through X of this notice (identifying the applicable section of this notice under which the document failure is corrected) with respect to a failure to comply with § 409A, and that the service provider must attach a copy of the statement to the service provider’s income tax return for the taxable year in which the failure was corrected and also to the extent applicable, any subsequent taxable year in which an amount is included in income under § 409A by the service provider as part of the correction.

(2) The information described in §§ XII.B.(1) through (4) of this notice, but only to the extent that the information relates to a deferred amount of that service provider.”

G. To provide relief from the employee information reporting requirements upon use of the transition relief in § VI.B.3 or § XI of Notice 2010-6, § XII.D of Notice 2010-6 is modified to read as follows:

“D. Attachment to Service Provider Tax Return for Failures Described in any of §§ V through X of this Notice not Eligible for Relief under § VI.B.3 or § XI of this Notice

The service provider must attach to the service provider's income tax return a copy of the statement the service provider received from the service recipient with respect to a failure described in any of §§ V through X of this notice that is not eligible for and corrected under the relief provided in § VI.B.3 or § XI of this notice. If a service provider has included an amount in income to be eligible for relief under this notice, and that inclusion in income occurs in a year subsequent to the year the plan was corrected, the service provider must include the statement with the return for the year of the correction as well as the return for the year of income inclusion."

H. To provide relief from the employee information reporting requirements upon the correction of an operational failure in the same taxable year as the failure occurs, § IX.A of Notice 2008-113 is modified to read as follows:

"A. Information Required with Respect to Correction of an Operational Failure in the Same Taxable Year as the Failure Occurs

A service recipient described in § IV of this notice must attach to its timely filed (including extensions) original federal income tax return for its taxable year in which the failure occurred a statement entitled "§ 409A Relief under IV of Notice 2008-113" stating that it is relying upon § IV of this notice with respect to a correction of a failure to comply with § 409A and setting out the following information with respect to each such failure:

1. The name and taxpayer identification number of each service provider affected by the failure and whether such service provider is an insider with respect to the service recipient. Where the same or a substantially similar operational failure has occurred with respect to multiple service providers, the information required in § IX.A.2 through 5 may be supplied only once with respect to such operational failure, provided

that the identification of each service provider affected by the operational failure in this § IX.A.1 references such information and the amount involved in the operational failure with respect to such service provider.

2. Identification of the nonqualified deferred compensation plan with respect to which such failure occurred.

3. A brief description of the failure and the circumstances under which it occurred, including the amount involved and date on which the failure occurred.

4. A brief description of the steps taken to correct the failure and the date on which such correction was completed.

5. A statement that the operational failure is eligible for the correction under the terms of this notice, and that the service recipient has taken all actions required, and otherwise met all requirements, for such correction.

In addition, each service recipient relying on the relief provided in § IV of this notice must make reasonable efforts to provide notice to the examining agent upon the commencement of an examination of the service recipient's federal tax return that the service recipient was relying upon the relief provided under this notice for years covered by the examination."

IV. EFFECTIVE DATE

Taxpayers may rely on this Notice 2010-80 for the modifications to Notice 2008-113 for taxable years beginning on or after January 1, 2010. Taxpayers may rely on this Notice 2010-80 for the modifications to Notice 2010-6 for taxable years beginning on or after January 1, 2009.

V. EFFECT ON OTHER DOCUMENTS

Notice 2008-113 and Notice 2010-6 are modified as provided in this notice. Except as explicitly provided, this notice does not otherwise affect the guidance provided in Notice 2010-6 and Notice 2008-113.

VI. DRAFTING INFORMATION

The principal author of this notice is Keith Ranta of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice, contact Keith Ranta at (202) 927-9639 (not a toll-free number).